81-1038

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JACK DUCKWORTH,
Warden, and
LINLEY E. PEARSON,
Attorney General of Indiana,

Petitioners,

VS.

WILLIAM L. COWELL,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the Seventh Circuit has decided erroneously and in a way in conflict with controlling decisions of this Court that dual representation by an attorney of a defendant and a prosecution witness is a *per se* violation of the Sixth Amendment.

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No. _____

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JACK DUCKWORTH,
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VS.

WILLIAM L. COWELL,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners Jack Duckworth, Warden, and Linley E. Pearson, Attorney General of Indiana, respectfully pray this Court issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit (hereinafter Seventh Circuit) entered in Cause Number 81-1780 on September 18, 1981, which affirmed the judgment of the United States District Court for the Northern District of Indiana, South Bend Division (hereinafter District Court).

OPINIONS BELOW

The order of the Seventh Circuit issued September 18, 1981, has not been officially reported. A copy of the Order is

appended hereto at page A-1. The April 27, 1981, memorandum and order of the District Court has been officially reported. *Cowell v. Duckworth*, 512 F.Supp. 371 (N.D. Ind. 1981). A copy of said memorandum and order is appended hereto at page A-4.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1) and Rule 17.1(c) of the Rules of this Court to review a judgment of a federal court of appeals that has decided a federal question in a way in conflict with applicable decisions of this Court.

The judgment of the Seventh Circuit was entered on September 18, 1981. This petition is timely filed in that it is filed prior to the expiration of the ninety (90) day period allowed by 28 U.S.C. §2101 (c) and Rule 20.2.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

This petition arises from the affirmance on appeal, by the Seventh Circuit, of a judgment by the District Court in the case of *William Cowell v. Jack Duckworth, et al.*, Cause

Number S81-93, whereby the District Court granted a petition for a writ of habeas corpus filed by Respondent Cowell (petitioner in the District Court). Jurisdiction in the District Court was founded upon 28 U.S.C. §2241, *et seq.* Jurisdiction in the Seventh Circuit was founded upon 28 U.S.C. §1291.

FACTS MATERIAL TO CONSIDERATION OF THE QUESTION PRESENTED

Respondent, a prisoner at the Indiana State Prison, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254, in the District Court, alleging that his conviction in state court is constitutionally infirm for several reasons, among then that he was given ineffective assistance of counsel due to a conflict of interest on the part of the attorney retained by his wife to represent him. The District Court issued its memorandum and opinion on April 27, 1981, and entered judgment that a writ of habeas corpus would issue unless the State elected to retry Respondent within 180 days. That judgment has been stayed pending appeal, and pending a determination of this petition. The District Court held that Respondent's counsel in the criminal proceeding had an actual conflict of interest between his representation of Respondent and two of the prosecution witnesses. The District Court further held that unconstitutional dual representation is never harmless error. On appeal by Respondents, the Seventh Circuit affirmed, holding that dual representation by an attorney of a defendant and a prosecution witness is a *per se* violation of the defendant's Sixth Amendment rights.

Respondent was charged with and convicted of the crime of murder in the first-degree in the death of William Siebert. Mr. Siebert was killed in Lake County, Indiana, on August 23, 1972. Respondent confessed to the murder. On appeal, the Supreme Court of Indiana affirmed the conviction. *Cowell v. State*, 263 Ind. 344, 331 N.E.2d 21

(1975). The issue of a conflict of interest was not raised in that appeal.

Following affirmance by the Supreme Court of Indiana, Respondent filed a petition for post-conviction relief in the court of conviction. Among the issues raised was that of ineffective assistance of counsel due to the alleged conflict of interest on the part of counsel. The petition was denied as to all grounds following an evidentiary hearing, and the denial was affirmed by the Supreme Court of Indiana. *Cowell v. State*, Ind., 416 N.E.2d 839 (1981). The issue of ineffective assistance of counsel was specifically addressed in the opinion of the Supreme Court of Indiana. Respondent has, therefore, exhausted available state remedies.

The evidence at the hearing on the state petition for post-conviction relief established that Cowell's wife contacted a law firm and, using her own money, secured representation for him. A few days later Mrs. Cowell secured representation by the same firm for herself concerning a civil matter and an unrelated criminal charge against her. Mrs. Cowell also retained the same firm to represent her daughter, who she feared might be culpable as an accessory after the fact for transporting and harboring Cowell after the murder. Both Mrs. Cowell and her daughter testified at the criminal trial. Cowell contends that his counsel's cross-examination of these witnesses may have been restrained as a result of his representation of them.

Charlotte Siebert ("Seberg" in post-conviction record) testified she was presently the ex-wife of Cowell and that at the time of William Siebert's death on August 23, 1972, she was the latter's ex-wife, but was on that date Cowell's wife. (Post-Conviction transcript ("PCR") 81). After Siebert's death, she had been arrested for an unpaid bill at a Ramada Inn (PCR 83). Charlotte Siebert continued to testify that she had retained an attorney named Don Levinson, who worked with Max Cohen, to represent Cowell at trial (PCR 84). The same attorneys also represented Charlotte in:

obtaining the life insurance proceeds resulting from William Siebert's death; dealing with the decedent's estate in terms of buying back a house; representing her in connection with the Ramada Inn charge; and in "looking after her children" (PCR 84, 85). The children were apparently involved in the killing after the fact, and there was some indication they might also be charged (PCR 86-88). There was also some discussion between Attorney Levison and Mrs. Siebert that there was a strong possibility that Cowell might receive a sentence of two to fourteen years, and this was communicated to Cowell by Mrs. Siebert (PCR 89-90). The charge against Mrs. Siebert involving the Ramada Inn was subsequently dismissed, and her children were never charged as accessories (PCR 90, 91). Mrs. Siebert was apparently told, the night Cowell was arrested, that if she were to sign statements, she would not be charged with the Ramada Inn incident and her children would not become involved (PCR 91). Prior to Cowell's trial, Mrs. Siebert had been told by attorney Levinson "...to not worry about it, they'd take care of it, just answer whatever questions would come up." (PCR 91). Mrs. Siebert then testified as to the present whereabouts of some of her children (PCR 93, 96). Mrs. Siebert then testified that at the time of the killing, her will and that of William Siebert were one and the same and that she had written it, but did not know whether it had been changed after the divorce (PCR 96). Mrs. Siebert concluded her testimony on direct examination by stating that she and Cowell had been married for over two years and that he had always been protective of her (PCR 97).

On cross-examination, Mrs. Siebert testified that she and her children had been subpoenaed by the prosecutor to testify at Cowell's trial, and that her attorneys had told her not to worry but to go ahead and answer the questions (PCR 98). On the night of Cowell's arrest, she and her children had given statements to the police (PCR 98). A prosecuting attorney had made representations prior to trial that

everything would be taken care of, not to worry and that her lawyer would take care of it (PCR 101, 103). Mrs. Siebert further testified on cross-examination that she had retained attorneys Cohen and Levinson to represent her in the civil matters approximately a week after she had retained them to represent Cowell (PCR 103). The civil matters were taken care of prior to Cowell's trial, while the Ramada Inn matter was not disposed of until a couple of years later (PCR 103, 104).

At the criminal trial, Cowell's then wife (Mrs. Siebert) and her relatives were called as witnesses for the state and gave testimony generally implicating themselves as accessories after the fact to the killing (Transcript of criminal trial ("Tr") 455-459, 470-476, 477-491, 503-519).

However, the record establishes that the wife's testimony, as a prosecution witness, did not implicate Cowell in any way (Tr. 455-459). The wife later testified as a defense witness and gave testimony implicating Cowell, but at the same time she described Cowell's mental instability, which supported his insanity defense (Tr. 648-709). The daughter's testimony during the State's case did implicate Cowell (Tr. 503-519) but, as the Supreme Court of Indiana noted in its opinion, "defendant at no time denied that he had committed the homicide. Rather having made a confession to the police and admitting guilt on the stand his defense was that of insanity." *Cowell v. State* (1981), *supra*, 416 N.E.2d at 841. On cross-examination, Cowell's attorney elicited from the daughter that she thought that at the time of the offense Cowell was "sick" and "disturbed" (Tr. 513-515).

REASONS FOR ALLOWANCE OF THE WRIT

The Seventh Circuit Has Decided Erroneously And In A Way In Conflict With Controlling Decisions Of This Court That Dual Representation By An Attorney Of A Defendant And A Prosecution Witness Is A Per Se Violation Of The Sixth Amendment

The Seventh Circuit held that without an informed consent by a defendant, dual representation by an attorney of that defendant and a prosecution witness is a *per se* violation of such defendant's Sixth Amendment rights. The District Court held that there was an actual conflict of interest and that unconstitutional multiple representation is never harmless, the existence of the conflict itself demonstrating a denial of effective assistance of counsel.

The opinion of the Seventh Circuit is in direct and irreconcilable conflict with each of two recent decisions of this Court. *Cuyler v. Sullivan*, U.S., 100 S.Ct. 1708 (1980); *Wood v. Georgia*, U.S., 101 S.Ct. 1097 (1981). In *Cuyler*, this Court held that

> Absent special circumstances, therefore, trial courts may assume either that multiple representation entails no conflict or that the lawyer and his clients knowingly accept such risk of conflict as may exist. *Cuyler, supra*, 100 S.Ct. at 1717.

While this Court has stated that there is a presumption that there is no conflict, the Seventh Circuit has held that there is an unrebuttable presumption that there is a conflict and that such conflict is a denial of Sixth Amendment rights.

In *Cuyler v. Sullivan, supra*, this Court also held that:

> In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial *must demonstrate* that an actual conflict of interest adversely affected his lawyer's performance. *Id., 100* S.Ct. at 1718. (Emphasis added).

The opinion of Justice Brennan would change the presumption, so that in the absence of a knowing waiver, and upon a showing that there is a significant possibility of conflict of interest, a defendant is entitled to a *rebuttable* presumption that representation suffered. This change would, however, still allow the government an opportunity to rebut the presumption by demonstrating that representation was not actually affected. The opinion of Justice Marshall would still require a determination of whether there existed during trial an actual, relevant conflict of interests. Neither the decision of the Court nor any separate opinion is consistent with a *per se* rule.

The Third Circuit was reversed in *Cuyler* because it had relied upon a possible (as opposed to actual) conflict of interest. The *per se* rule of the Seventh Circuit allows, and allowed in this case, vacating a state court judgment of conviction whenever dual representation is present. Under the *per se* rule, there is no inquiry as to whether there is an actual conflict, let alone a prejudicial, adverse effect on the lawyer's performance. While the District Court held that there was an actual conflict, it did not hold that there was an adverse effect on the lawyer's performance. The Seventh Circuit did not even hold that an actual conflict exists, but that the mere fact of dual representation without more is a violation. This *per se* rule cannot be reconciled with this Court's holding in *Cuyler*, and a writ of certiorari should be allowed.

The decision of the Seventh Circuit is further directly and irreconcilably in conflict with *Wood*, *supra*. Throughout *Wood*, it was observed that there is a "risk of conflict of interest" (*Wood*, *supra*, 101 S.Ct. at 1101) and that "there is a clear possibility of conflict of interest." *Id.*, 101 S.Ct. at 1101. In *Wood*, the owner of "adult" establishments paid attorney fees for employees arrested in his establishments. This Court *sua sponte* raised the question of a possible due process violation because of the possible conflict of interest, and the case was remanded

with instructions that it be returned to the state court for a hearing to determine whether an actual conflict of interest existed. *Wood, supra*, 101 S.Ct. at 1104. Remand was required because

> On the record before [this Court], [it] cannot be sure whether counsel was influenced in his basic strategy decision by the interests of the employer who hired him. *Id.*, 101 S.Ct. at 1103-04.

In the present case, the Seventh Circuit did not review the record to determine whether there was an actual conflict or whether any decision of counsel was influenced by the interest of his other clients or of the person who paid him. Each of the four separate opinions in *Wood v. Georgia* dealt with the remand for hearing because of a possible as opposed to an actual conflict. Justice White, in dissent, would have held that there was no actual conflict of interest. Thus, each of the five opinions rejected the rule that the Seventh Circuit has applied. If there were a *per se* rule, the remand in *Wood* would not have been necessary.

The opinion of the Seventh Circuit is therefore in direct and irreconcilable conflict with the decision of this Court in *Wood*, and a writ of certiorari should be allowed.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari to review the judgment and order of the Seventh Circuit should be granted.

Respectfully submitted,

LINLEY E. PEARSON
Attorney General of Indiana

DAVID A. ARTHUR
Deputy Attorney General

KERMIT R. HILLES
Deputy Attorney General

Attorneys for Petitioners

Appendix

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604
Argued September 16, 1981
September 18, 1981.

Before
HON. LUTHER M. SWYGERT, Senior Circuit Judge
HON. ROBERT A. SPRECHER, Circuit Judge
HON. BARBARA B. CRABB, District Judge*

WILLIAM L. COWELL, *Petitioner-Appellee*, No. 81-1780 vs. JACK DUCKWORTH, Warden, and LINLEY E. PEARSON, Attorney General of Indiana, *Respondents-Appellants.*	Appeal from the United States District Court for the Northern District of Indiana, South Bend Division. No. 81-C-0093 Allen Sharp, Judge.

ORDER

The Court, having read the briefs, addressed itself to the record, heard oral argument on behalf of the appellants, and conferred at the bench, announced in open court that the judgment appealed from is affirmed.

In *Ross v. Heyne*, 633 F.2d 979 (7th Cir. 1980), this court held that without an informed consent by a defendant, dual

*The Honorable Barbara B. Crabb, United States District Judge for the Western District of Wisconsin, sitting by designation.

representation by an attorney of that defendant and a prosecution witness is a *per se* violation of such defendant's Sixth Amendment rights.

The uncontested facts in this case show clearly that appellee's attorney represented two state witnesses while representing Cowell.

The judgment of the district court is affirmed.

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604
Argued September 16, 1981
September 18, 1981.

Before
HON. LUTHER M. SWYGERT, Senior Circuit Judge
HON. ROBERT A. SPRECHER, Circuit Judge
HON. BARBARA B. CRABB, District Judge*

WILLIAM L. COWELL, *Petitioner-Appellee,* No. 81-1780 vs. JACK DUCKWORTH, Warden, and LINLEY E. PEARSON, Attorney General of Indiana, *Respondents-Appellants.*	))))))))	Appeal from the United States District Court for the Northern District of Indiana, South Bend Division. No. 81-C-0093 Judge Allen Sharp,

This cause was heard on the record from the United States District Court for the Northern District of Indiana, South Bend Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby AFFIRMED, in accordance with the order of this Court entered this date.

*The Honorable Barbara B. Crabb, United States District Judge for the Western District of Wisconsin, sitting by designation.

United States District Court

Northern District of Indiana
South Bend Division

WILLIAM L. COWELL, *Petitioner,*	)	
v.	)	No. S 81-93
JACK DUCKWORTH, Warden of Indiana State Prison, and ATTORNEY GENERAL of THE STATE OF INDIANA, *Respondents.*	)	

MEMORANDUM AND ORDER

Petitioner, William L. Cowell, is a state prisoner confined at the Indiana State Prison at Michigan City, Indiana, who filed this petition pursuant to 28 U.S.C. §2254. Cowell was tried and convicted on April 30, 1973 in the Lake County Criminal Court of first degree murder and was sentenced to life imprisonment. Cowell appealed his conviction to the Supreme Court of Indiana alleging several issues including the question of whether his confession was voluntary. The Supreme Court of Indiana affirmed the conviction in a published opinion, *Cowell v. State*, ___ Ind. ___, 331 N.E. 2d 21 (1975). Cowell subsequently filed a petition for post-conviction relief raising several additional issues, including allegations of ineffectiveness of counsel due to a conflict of interest on the part of the attorney retained by his wife to represent him. The petition was denied by the trial court and this action was upheld on February 23, 1981, by the Supreme Court of Indiana. The transcript of proceedings in the state courts has been filed with this

Court and it has been thoroughly reviewed pursuant to *Townsend v. Sain*, 372 U.S. 293 (1963).

The habeas petition alleges ineffectiveness of counsel, that the psychiatrist who examined him was not qualified to so so, that he was denied due process of law by introduction of his past criminal record, that his confession was not voluntary, and that there were irregularities in the trial proceedings and abuse of discretion by the trial court. Petitioner has properly presented the questions of effectiveness of counsel and voluntariness of his confession to the state courts and has exhausted the remedies available to him in state courts as required by 28 U.S.C. §2254(b) and *Pitchess v. Davis*, 421 U.S. 482 (1975). Petitioner has not exhausted his state court remedies as to the remaining issues. Therefore, this Court can only address the allegations of ineffective assistance of counsel and the voluntariness of the confession.

William Cowell signed a statement in which he confessed to the murder of William Siebert. That statement was introduced into evidence at trial. (Tr. 879-881). Cowell testified that he had not been informed of his constitutional rights, prior to making the statement, that his requests for an attorney were refused, that he was knocked down and shoved by policemen, and that he was denied treatment for an injured foot until he confessed. (Tr. 579-587). Three police officers testified that Cowell was given Miranda warnings three times prior to signing the waiver and confession (Tr. 604, 607-8, 614-15), that he did not request an attorney and that his foot was treated prior to the time of the written confession. The trial court overruled Cowell's motion to suppress his waiver and statement. (Tr. 618). The Supreme Court of Indiana held that:

> It is the trial judge who weighs conflicting evidence. On appeal we do not disturb a trial court's ruling as to the admissibility of a confession based on conflicting evidence except for abuse of discretion (citations

omitted). It was not an abuse of discretion for the trial court to conclude that the confession was voluntary. 331 N.E. 2d at 23-24.

Where a state court has made a determination, after a hearing on the merits of a factual issue, evidenced by a written finding or opinion, federal district courts should rely on those findings of fact unless one of the conditions set forth in 28 U.S.C. §2254(d) or *Townsend v. Sain, supra*, is met. In this case, none of the exceptions found in §2254(d) or *Townsend v. Sain* applies. The trial court heard the conflicting testimony of Cowell and the police officers concerning whether Cowell was advised of his constitutional rights and the other conditions surrounding Cowell's statement. United States Code section 2254(d) creates a "presumption of correctness" on behalf of factual determinations made by state courts. Here the trial court made a determination, after a hearing on the merits of a factual issue, that the defendant had been read his Miranda rights. This determination is fully supported by the testimony of Officers Hauckman (R. 603-605), Pearson (R. 606-608), and Carroll (R. 614-615). The trial court determined that the confession was voluntary and admissible. There is nothing in the record to justify disturbing this determination. See *Sumner v. Mata*, 49 U.S.L.W. 4133 (1981), slip opinion January 21, 1981, No. 79-1601.

Petitioner also alleges that his counsel was ineffective in that at the time of his criminal trial his attorney was representing his wife and daughter, as well as himself, which resulted in a conflict of interest.

A criminal defendant is denied his constitutional right to effective assistance of counsel when his trial attorney, without his knowledge and consent, concurrently represents a prosecution witness who gives damaging testimony and whose interests are adverse to his. *Stephens v. United States*, 595 F. 2d 1066 (5th Cir. 1979); *Castillo v.*

Estelle, 504 F. 2d 1243 (5th Cir. 1974); *United States ex rel Williamson v. LaVallee*, 282 F. Supp. 968 (E.D. N.Y. 1968). However

> The mere fact of dual representation standing alone, does not create a Sixth Amendment violation. A conflict of interest must first be established. *United States ex rel Williams on v. LaVallee, supra*, at 974.

The Sixth Amendment guarantees each criminal defendant the right to the effective assistance of counsel. *Argersinger v. Hamlin*, 407 U.S. 25 (1972). The courts have long recognized that this right may be impaired when counsel represents multiple defendants in the same case. *Glasser v. United States*, 315 U.S. 60 (1942). Nevertheless, multiple representation without a showing of conflict of interest is not in itself a violation of the Sixth Amendment. *United States v. Mandell*, 525 F. 2d 671, 677 (7th Cir. 1975), *cert. den.*, 423 U.S. 1049 (1976). The typical conflict of interest claim arises when one attorney represents multiple defendants. See, e.g., *Holloway v. Arkansas*, 435 U.S. 475 (1978). Here the alleged conflict arose out of defense counsel's representation of the defendant's wife, Charlotte Cowell, and daughter who Mrs. Cowell feared might be culpable as an accessory after the fact for transporting and harboring Cowell.

Charlotte Siebert (Seberg in post-conviction record) testified she was presently the ex-wife of Appellant Cowell and that at the time of William Siebert's death on August 23, 1972, she had been the latter's ex-wife, having been married to Appellant Cowell at the time (R. 81). After Siebert's death, she had been arrested for an unpaid bill at a Ramada Inn (R. 83). Charlotte Siebert continued to testify that she had retained an attorney named Don Levinson, who worked with Max Cohen, to represent Appellant Cowell at trial (R. 84). The same attorneys also represented Charlotte in: obtaining the life insurance proceeds resulting from William Siebert's death of which she was

beneficiary; dealing with the decedent's estate in terms of buying a house back; representing her in connection with the Ramada Inn charge; and in "looking after" her children (R. 84, 85). The latter were apparently involved in the killing after the fact and there had been some indication they might also be charged (R. 86-88). There was also some discussion with Attorney Levinson and Mrs. Siebert that there was a strong possibility Appellant Cowell might receive a sentence of two to fourteen years and this was communicated to Appellant by Mrs. Siebert (R. 89-90). The charge against Mrs. Siebert involving the Ramada Inn was subsequently dismissed and her children were never charged as accessories (R. 90, 91). Mrs. Siebert was apparently told the night Appellant was arrested that if she signed statements, she would not be charged with the Ramada Inn incident and her children would not become involved (R 91). Prior to Appellant's trial Mrs. Siebert had been told by Attorney Levinson "...to not worry about it, they'd take care of it, just answer whatever questions would come up." (R. 91). Mrs. Siebert then testified as to the present whereabouts of some of her children (R. 93, 96). Mrs. Siebert then testified that at the time of the killing William Siebert's and her Will had been the same and that she had written it, but did not know whether it had been changed after the divorce (R. 96). Mrs. Siebert concluded her testimony on direct examination by stating that she and Appellant Cowell had been married for over two years and that he had always been protective of her (R. 97).

On cross-examination Mrs. Siebert testified she and her children had been subpoenaed by the prosecutor to testify at Petitioner's trial and that her attorneys had told her not to worry but to go ahead and answer the questions (R. 98). On the night of Petitioner's arrest, she and her children had given statements to the police (R. 98). A prosecuting attorney had made representations prior to trial that everything would be taken care of, not to worry and that her lawyer would take care of it (R. 101, 103). Mrs. Siebert

further testified on cross-examination that she had retained Attorneys Cohen and Levinson to represent her in the civil matters approximately a week after she had retained them to represent Petitioner (R. 103). The civil matters were taken care of prior to Petitioner's trial, while the Ramada Inn matter was not disposed of until a couple of years later (R. 103, 104).

At the trial petitioner's then wife and her relatives were called as witnesses for the state and gave testimony generally implicating themselves as accessories after the fact to the killing (Tr. 455-459; Tr. 470-476; Tr. 477-491; Tr. 503-519).

However, the record establishes that Mrs. Cowell's testimony, as a prosecution witness, did not implicate Cowell in any way. (Tr. 455-459). Mrs. Cowell later testified as a defense witness and gave testimony implicating Cowell, but at the same time she described defendant's mental instability which supported his insanity defense. (Tr. 648-709). The daughter's testimony did implicate Cowell (Tr. 503-519) but, as the Supreme Court of Indiana noted in its opinion, "defendant at no time denied that he had committed the homicide. Rather having made a confession to the police and admitting guilt on the stand his defense was that of insanity." (*Cowell v. State*, opinion of state court on petition for rehearing at page 3). On cross-examination, Cowell's attorney elicited from the daughter that she thought, at the time of the offense, that Cowell was "sick" and "disturbed." (Tr. 513-515).

The Seventh Circuit Court of Appeals recently addressed this issued in a very similar factual setting in *Ross v. Heyne*, 638 F. 2d 979 (7th Cir. 1980). There the court stated as follows:

> In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance.

> *Cuyler v. Sullivan*, 446 U.S. at 348. *An actual conflict would arise where defense counsel in unable to cross-examine a prosecution witness effectively because the attorney also represented the witness. United States v. Mavrick*, 601 F. 2d 921, 931 (7th Cir. 1979). The problem that arises when one attorney represents both the defendant and the prosecution witness is that the attorney may have privileged information obtained from the witness that is relevant to cross-examination, but which he refuses to use for fear of breaching his ethical obligation to maintain the confidences of his client. *See* Code of Professional Responsibility, Can 4 & DR 4-101(B)(2). "The more difficult problem which may arise is the danger that counsel may overcompensate and fail to cross-examine fully for fear of misusing his confidential information." *United States v. Jeffers*, 520 F. 2d 1256, 1265 (7th Cir. 1975), *Cert. denied*, 423 U.S. 1066 (1976)." *Id.* at 983. (emphasis added)

Thus Cowell's lawyer had an actual conflict of interest between his representation of the accused and two of the prosecution witnesses. *Glasser v. United States*, 315 U.S. 60 (1942), established that unconstitutional multiple representation is never harmless error. Further, the court refused "to indulge in nice calculations as to the amount of prejudice" attributable to the conflict because the conflict itself demonstrated a denial of "the right to have the effective assistance of counsel." *Id.*, 315 U.S. at 76.

Therefore, the law of this circuit requires this Court to grant the petitioner's writ of habeas corpus in view of the clear violation of Cowell's Sixth Amendment rights. The writ of habeas corpus will now issue unless the State should elect to retry Cowell within 180 days. SO ORDERED.

Enter April 27, 1981.

/s/ ALLEN SHARP
Allen Sharp
Judge, United States District Court

JUDGMENT ON DECISION BY THE COURT

United States District Court

For the

Northern District of Indiana

CIVIL ACTION FILE NO. S81-93

WILLIAM L. COWELL,	)	
	)	
vs.	)	JUDGMENT
JACK DUCKWORTH,	)	
Warden	)	
INDIANA ATTORNEY	)	
GENERAL	)	

This action came on for (hearing) before the Court, Honorable ALLEN SHARP, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that judgment is entered for the Petitioner and against the Respondents and Petitioner's writ for habeas corpus will now issue unless the State should elect to retry Petitioner within 180 days.

Dated at SOUTH BEND, INDIANA, this 27th day of APRIL, 1981.

RICHARD E. TIMMONS
Clerk of Court

BY TERESE M. HINKLE
Deputy Clerk

Office - Supreme Court, U.S.
FILED
JAN 21 1982
ALEXANDER L. STEVAS,
CLERK

NUMBER 81-1038

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JACK DUCKWORTH,
Warden, and
LINLEY E. PEARSON
Attorney General of Indiana,

Petitioners,

vs.

WILLIAM L. COWELL,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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NUMBER 81-1038

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JACK DUCKWORTH,
Warden, and
LINLEY E. PEARSON
Attorney General of Indiana,

Petitioners,

vs.

WILLIAM L. COWELL,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, WILLIAM L. COWELL, respectfully prays this Court to deny to issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in Cause Number 81-1780 on September 18, 1981, which affirmed the judgment of the United States District Court for the Northern District of Indiana, South Bend Division.

FACTS MATERIAL TO CONSIDERATION OF THE QUESTION PRESENTED

Respondent would add the following to the facts presented by Petitioners.

At the post-conviction hearing Respondent, WILLIAM COWELL, denied having killed the decedent and testified that he admitted to it only to protect his then wife, CHARLOTTE SIEBERT, and because he had been led by her to believe he would receive a light sentence. (PCR 106, 121).

The indication that WILLIAM COWELL, by admitting the shooting, receive a light sentence, was prompted by letters from CHARLOTTE SIEBERT to WILLIAM COWELL. (PCR 108, 109). Two (2) of these letters were shown to his trial counsel during the trial. (PCR 109).

Respondent, WILLIAM COWELL, also indicated during the post conviction hearing that during the trial the jury was never made aware of any deals between his then wife, CHARLOTTE SIEBERT, and her relatives in exchange for their testimony on behalf of the State. (PCR 116, 117). Respondent also indicated that he was never made aware of any deals between CHARLOTTE SIEBERT and the State and was not aware that she would be testifying for the State until the trial started. (PCR 114, 116).

REASONS FOR DENYING THE WRIT

The Seventh Circuit Has Decided Correctly And In A Way Not In Conflict With Controlling Decisions Of This Court That Dual Representation By An Attorney Of A Defendant And A Prosecution Witness Is A Per Se Violation Of The Sixth Amendment.

ARGUMENT

The Seventh Circuit did hold that without an informed consent by a defendant, dual representation by an attorney of that defendant and a prosecution witness is a per se violation of such defendant's Sixth Amendment rights.

This opinion of the Seventh Circuit is in no way conflicting with the recent decisions of this Court.

Petitioners' first cites *Cuyler v. Sullivan,* U.S., 100 S.Ct. 1708 (1980). The Cuyler case involves joint representation of co-defendants. This Court noted in that decision that joint representation of co-defendants is often advantageous to both defendants. Hence, very often there would be no conflict whatsoever. Hence, this Court held in *Cuyler,* that:

> ...absent special circumstances, therefore, trial courts may assume either that multiple representation entails no conflict or that the lawyer and his clients knowingly accept such risk of conflict as may exist. *Cuyler v. Sullivan, supra,* 100 S.Ct. at 1717.

The case now before the Court involves dual representation of a defendant and two (2) of the prosecution witnesses. Clearly, a different issue than was before the Court in *Cuyler.*

While one can assume that joint representation of co-defendants is known to all parties and not a conflict, the same assumption can not be made with a defendant and prosecution witnesses.

Hence, the factual situation is so different that the ruling of the Seventh Circuit clearly does not conflict with the ruling in *Cuyler v. Sullivan, supra.*

The other case cited by Petitioners as conflicting is *Wood v. Georgia,* U.S. 101 S.Ct. 1097 (1981). This case also had a significantly different fact situation than the one now before the Court. In *Wood v. Georgia, supra,* we had a situation where an employer paid attorney fees for employees arrested in his establishment.

Because of a possible conflict of interest, this Court remanded for a determination as to whether an acutal conflict of interest occurred.

Clearly, in *Wood v. Georgia, supra,* there may well have been no conflict, and hence, a determination need to be made as to whether one existed. The significantly different factual situation means that the ruling of the Seventh Circuit is not in conflict with this Court's decision in *Wood vs. Georgia, supra.*

In both of the cited cases we can see that the dual representation would, not only not always cause a conflict, but would, in fact, very often be advantageous to all parties.

This is quite unlike the situation confronted by the Seventh Circuit; where dual representation of a defendant and two (2) prosecution witnesses is unknown and not consented to by the defendant can never exist without conflict. There would always be a conflict between the defendant being tried and the witnesses called by the State to convict the defendant. This is especially true, where as here, the common attorney made various deals for the witnesses when their testimony was traded for their not being charged and prosecuted.

The opinion of the Seventh Circuit is clearly not in conflict with either *Cuyler* or *Wood,* and is in fact, proper and hence a writ of certiorari should not be allowed.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari to review the judgment and order of the Seventh Circuit should be denied.

Respectfully submitted,

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